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No. 07-1097

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT,

Petitioner,

v.

CAREY D. EBERT, TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the failure of Petitioner to timely appeal is a violation of his due process rights?

Whether the Petitioner has shown sufficient compelling reasons to grant his writ of Certiorari concerning his failure to file a timely appeal?

Whether the Petitioner is attempting to resurrect a claim that has been disposed of by a previous appeal?

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STATEMENT OF THE CASE

Contrary to the Petitioner's statement of the case, the core substantive issue of this case does not relate to the value of a piece of real estate Grapevine, Texas. Rather, it is whether the Petitioner's appeal was untimely.

The Petitioner's version of the case set forth in his petition is revisionist history. The true course of events is best shown in a timeline:

1. before May, 2000, the Petitioner was involved in a complicated series of lawsuits involving a piece of real property located in Grapevine, Texas;
2. on May 31, 2000, a judgment for over a million dollars was entered against the Petitioner;
3. Petitioner filed a Chapter 11 bankruptcy, later converting the matter to a Chapter 7 bankruptcy;
4. Respondent was appointed Chapter 7 Trustee on November 14, 2001;
5. because the value of the property was less than the judgment, Respondent moved to abandon the property;
6. this motion to abandon was approved by the Bankruptcy Court on December 10, 2002;
7. the Petitioner then claimed the judgment creditor owed him rent on the property, despite the fact this claim had been disposed of

in connection with the state court litigation that had resulted in the judgment against him;

8. the Petitioner filed a motion to compel the Respondent to abandon this previously litigated claim to him on November 18, 2002;

9. the Bankruptcy Court denied Petitioner's request on April 24, 2003;

10. the Petitioner moved for rehearing on his Motion to Compel Respondent to Abandon, which was denied on August 12, 2003;

11. the Petitioner timely appealed the matter to the District Court on August 12, 2003;

12. after the Petitioner corrected an initial deficiency in his appeal, the matter was docketed on appeal on May 4, 2004;

13. pursuant to Bankruptcy Rule 8009, the Petitioner's brief was due May 19, 2004;

14. the Petitioner filed no brief (claiming his counsel was too busy with another appeal to this Court), and the District Court entered a Show Cause Order requiring the Petitioner explain why his appeal should not be dismissed for failure to file a brief;

15. the Show Cause Order specified that "your appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another document," (Pet. App. at 25);

16. the Petitioner filed a response on June 23, 2004 to this Show Cause Order, which his appellate brief attached thereto as an exhibit;

17. the District Court ordered the Response to be "unfiled" on June 28, 2004, and again specifically ordered that the brief be "filed separately as its own document,";

18. the Petitioner never obeyed either of these orders, and so his appeal was dismissed on February 25, 2005;

19. on August 18, 2006, the Fifth Circuit affirmed this dismissal, finding the Petitioner's refusal to properly file his brief even after having his error pointed out to him demonstrated a "certain stubbornness or willfulness sufficient to warrant dismissal," (Pet. App at 32);

20. the Petitioner sought a rehearing en banc, which was denied on October 2, 2005;

21. at this point the appeal the Respondent will refer to as the "First Appeal" was complete;

22. rather than seeking certiorari, the Petitioner returned to the Bankruptcy Court and filed a Motion for Rehearing, once again asking it to reconsider its prior denial of his Motion to Abandon, i.e., the matter that had been subject to and decided in the First Appeal;

23. this request was denied on October 6, 2006;

24. the Petitioner then files a Notice of Appeal to the District Court on October 20, 2006;

25. the Respondent will call this proceeding the "Second Appeal";

26. pursuant to Bankruptcy Rule 8002, an appeal from a decision of the Bankruptcy Court must be filed within ten (10) days of the date of the order being appealed; the District Court found the Petitioner's appeal was untimely and dismissed it on January 17, 2007;

27. the Fifth Circuit affirmed this disposition, finding that the failure to timely file his appeal meant the District Court lacked jurisdiction over the Petitioner's claims; and

28. the Petitioner now seeks certiorari, claiming he was denied due process because some unknown clerk refused to file the brief that was due in the First Appeal over four years ago.

The Petitioner has not been denied due process; in fact, he has had more process than any other debtor the Respondent has seen. The Petitioner's claims that he was denied due process by an error in the clerk's office are incorrect and have already been decided against him. The Petitioner is not the "Innocent and Faultless Litigant" he claims to be, and his due process claims should be rejected.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

A. The Petitioner's Argument

The Petitioner's argument is simple: it violates his due process rights to dismiss his appeal. The Petitioner bases this argument on the claim that the only reason his appeal was dismissed is because of a mistake made by the clerk, and that he is an "Innocent and Faultless Litigant" who has been harmed by the error of another.

B. The Petitioner's Due Process Rights Were Not Violated

The problem with the Petitioner's argument is threefold: (1) it is factually wrong; (2) it has already been rejected in the First Appeal; and (3) the reason the Petitioner's appeal was dismissed in the Second Appeal is because he missed a deadline, not because of any problems with his brief. Nothing about this case has resulted in any due process violation.

1. The Petitioner Is Wrong

The primary problem with the Petitioner's argument is it is wrong. The Petitioner made the same argument in the First Appeal, and it was rejected by courts which found the Petitioner's failure to file his brief in the District Court was not the product of a mistake made by the clerk, and because the Petitioner was both informed of, and afforded multiple

opportunities to correct his error. His failure to do so demonstrates that any mistake was the Petitioner's. *Goldblatt v. Ebert* (*In re Goldblatt*), 203 Fed.Appx. 545, 547-48 (5th Cir. Aug. 18, 2006) (per curiam). This argument has been made and was lost in the First Appeal; the Petitioner should not be allowed to relitigate the matter in the Second Appeal.

2. The Petitioner's Due Process Rights Were Not Violated

Even if this were not the case, the Petitioner's arguments should be rejected because nothing about the way this case has been handled has resulted in any due process violation.

a. What Due Process Requires

Although the question of what "process" a person may be "due" can vary widely from case to case, the broad outline of what due process requires is well settled: due process requires that a litigant be afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In determining whether a person has received the amount of process that is his due, courts consider: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value of additional or different procedures that might be used; and (3) the government's interest, including the function

involved and the burdens additional or different procedures would entail. *Mathews*, 424 U.S. at 335; *accord, City of Los Angeles v. David*, 538 U.S. 715, 716 (2003) (per curiam).

b. The Petitioner Failed to Avail Himself of an Available Remedy – Twice

The Court has held, on many occasions and in many different contexts, that a litigant's failure to avail himself of some process available to him does not support a claim that he was denied due process. In a tax case discussing the sufficiency of pre- and post-deprivation hearings afforded to taxpayers, the Court recognized having a pre-deprivation hearing "constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 35 n. 21 (1990). In a criminal case involving the claim that an accused was denied the opportunity to plead insanity, the Court held due process had not been denied when he could have made the plea, but did not: "A claim of denial of due process can hardly be predicated upon the failure of a defense move." *United States v. Baldi*, 344 U.S. 561, 568 (1953). Nor may a due process challenge be maintained if a person fails to exhaust administrative remedies afforded them. *Aircraft & Diesel Equip Corp. v. Hirsch*, 331 U.S. 752, 774 (1947). In a case involving a challenge to the

penalties for exceeding the fixed rate for railroad service, the Court rejected the idea that the railroad's due process rights had been violated, holding "where such an opportunity [for a hearing] has been afforded and . . . the carrier fails to avail itself of the opportunity, it is then admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate . . . " *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 65 (1919). These decisions are echoed by decisions of lower courts arising in many different contexts, recognizing that a person who fails to avail himself or herself of an available procedure cannot claim to have been denied the due process that procedure would have provided. *See, e.g., Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 467 n. 9 (2nd Cir. 2006) (election case); *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (pleading issue in civil rights case).

Here, the Petitioner has failed to avail himself of remedies available to him not once, but twice. The first time he did not take advantage of a remedy available to him was at the end of his First Appeal: after the Fifth Circuit rejected his arguments, the remedy would be to do what he did here, i.e., seek a writ of certiorari. The Petitioner did not do so, and as a result of this failure he lost his chance to have the Court review his arguments in the appeal where they arose. The second time was after the Petitioner then sought rehearing of the matter in the Bankruptcy Court, but failed to timely appeal the denial of this decision to the District Court. His failure to timely

appeal was the basis of the decision below. *Goldblatt v. Ebert* (*In re Goldblatt*), 253 Fed.Appx. 340, 341-42 (5th Cir. Oct. 31, 2007) (per curiam).

Both times the Petitioner had a mechanism for having his argument heard, yet both times he failed to pursue it. This failure precludes his arguing he was denied due process because he was not *denied* due process; rather, he *failed to use* the process afforded him.

c. The Petitioner Has No Due Process Right to an Appeal

Alternatively, the Petitioner's due process argument should be rejected because it is based on the erroneous belief that he has a due process right to appeal the decision of the Bankruptcy Court. With respect to this argument, it is important to remember that not even the Petitioner claims he was denied notice and an opportunity to be heard in the Bankruptcy Court (not once, but twice). Rather he complains about how his First Appeal from the Bankruptcy Court to the District Court was handled.

However, even if the Petitioner's claims were accurate, they would be unavailing because he has no due process right to appeal to the District Court. All due process requires is that a litigant be afforded one fair trial on the merits; appellate review of this decision is not required. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit County*, 281 U.S. 74, 81 (1930). If appellate review is allowed, Congress may

permissibly impose limitations on this right, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 551-52 (1949) (due process did not prevent Congress from imposing a bond requirement), including the right to make the deadline to appeal a short one. *Clarkson Constr. Co. v. Occupations Safety & Health Rev. Comm'n*, 531 F.2d 451, 456 (10th Cir. 1976) (*citing Lichter v. United States*, 334 U.S. 742 (1948) *and Yakus v. United States*, 321 U.S. 414 (1944)).

This general rule has been specifically applied in bankruptcy cases where the claim is that requiring a litigant to obey an appellate deadline violated his constitutional rights. *Mitchell v. Burt Vetterlein & Bushnell PC* (*In re Stein*), 197 F.3d 421, 426 n. 11 (9th Cir. 1999) ("[W]here the procedural right to appeal is limited in time, and the onus is upon the party to determine when that time commences to run. *Any loss of rights by Gordon was due to his own neglect.*") (emphasis added); *see also In re Stafford*, 240 F. 155, 157 (D. Conn. 1917) (case decided under the Bankruptcy Act). Put more simply, the only due process the Petitioner was constitutionally entitled to receive was a hearing in the Bankruptcy Court, and he received two of those. Even if he was denied further appellate review by a mistake of the clerk this does not implicate the Petitioner's constitutional rights.

3. Cases Cited by the Petitioner Are Inapplicable

The Petitioner cites a series of cases he believes support his position, all of which are decided under Rule of Procedure 60 and address when a litigant has shown "excusable neglect" justifying setting aside a judgment. *Pioneer Inv. Svcs. Co. v. Brunswick*, 507 U.S. 380 (1993); *Community Dental Svcs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002); *Counts v. Wang Labs., Inc.* (*In re Virginia Information Sys. Corp.*), 932 F.2d 338 (4th Cir. 1991), *abrogated, Barnhill v. Johnson*, 503 U.S. 393 (1992); *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805 (3rd Cir. 1986); *Shepard Claims Svc., Inc. v. William Darrah & Assoc.*, 796 F.2d 190 (6th Cir. 1986); *United States v. Cirimi*, 563 F.2d 26 (2nd Cir. 1977); *King v. Mordowanec*, 46 F.R.D. 474 (D. R.I. 1969); and *Primbs v. United States*, 4 Cl. Ct. 366 (1984), *aff'd*, 765 F.2d 159 (Fed. Ct.), *cert. denied*, 471 U.S. 1068 (1985).[1] These cases are all distinguishable, for many reasons: (1) there was no mistake by the clerk that affected the Petitioner; (2) all the cases cited by the Petitioner involve mistakes made by the litigant's lawyer, but the Petitioner never argues his failure to file his brief was his lawyer's fault; (3) the

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[1] Interestingly, one of the Petitioner's cases actually supports the Respondent. *Greenspan v. Bogan*, 492 F.2d 375, 383 (1st Cir. 1974) (failure to appear was unexcused where litigant knew there would be a hearing and he was sent 13 separate notices and other documents on three occasions, yet received none of them and took no other action until after judgment was entered).

Petitioner has never argued that this matter is governed by the standards set forth in Rule 60; (4) none of the cases cited by the Petitioner involve arguments that had been rejected in a prior appeal; and (5) none of the cases cited by the Petitioner involve a litigant's failure to timely invoke available remedies. In short, while these cases show a blameless litigant may have an adverse judgment set aside where it was the product of his lawyer's gross error, they do not support the argument that the Petitioner has been denied due process here.

CONCLUSION

This case presents a clear example of a litigant seeking the proverbial "second bite at the apple": the Petitioner made an argument in the First Appeal, lost, went back to the Bankruptcy Court, complained again, lost again, filed the Second Appeal and now complains about the same alleged error in the First Appeal. Unfortunately for the Petitioner, there was never any error. If there was, it was resolved by the First Appeal and even if it could be advanced in the Second Appeal the Petitioner failed to obey the deadlines governing his appeal, a failure that led to his appeal being dismissed. "Due process does not require that there be a right to interminably litigate the issue (before, during and after)." *Clarkson Constr. Co.*, 531 F.2d at 456. The Petitioner has had his day in court, he lost – first because of his own obstinacy and then

because of his own failure to obey the rules – and so this case should be allowed to come to an end.

Respectfully submitted,

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